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No. 245

In the Supreme Court of the United States

OCTOBER TERM, 1968

HERMAN TALLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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After a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted on three counts of misbranding drugs, eight of forty-five counts of mail fraud, and one count charging a conspiracy to commit those offenses (18 U.S.C. 1341, 371; 21 U.S.C. 331(a), (k), 333(b), 352(a)).[1] The court of appeals affirmed (394 F. 2d 435).

Petitioner was the physician-author of the 1961 best-selling book, *Calories Don't Count,* which ex-

[1] Petitioner was tried alone. The indictment had been dismissed as to other co-defendants (three individuals and two corporations), who had previously pleaded guilty and had been fined. The individual co-defendants, as well as several other witnesses, testified for the government at trial.

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pounded his theory that obesity could be cured, without regard to caloric intake, by the ingestion of safflower oil. As originally drafted, the book recommended a dosage of three liquid ounces of safflower oil per day, which petitioner had been prescribing for his own patients. Before the book was published, however, petitioner, with his co-defendants and others, organized a corporation to market safflower oil capsules. Petitioner then prevailed upon the publisher to change the text so that the recommended daily dosage would be six capsules, which could be obtained from the new enterprise. The packages of capsules, labelled "CDC", contained a booklet identifying them with petitioner's "'Calorie's Don't Count' Weight Control Program." The six-capsule dosage contained only $1/15$ as much safflower oil as the liquid oil dosage originally recommended and, as petitioner later admitted, was worthless as a cure for obesity even in terms of his own theory (See Pet. App. 2–3).

1. Petitioner's principal contention is that there was a fatal inconsistency in the verdict arising from the jury's findings of guilty on three felony misbranding counts and of conspiracy "as a misdemeanor." With respect to the drug misbranding counts, the trial judge instructed the jury that it could convict either as charged (*i.e.* a felony) or, if it found that petitioner had no intent to defraud or mislead, as a misdemeanor (R. 4442–4443, 4474, 4484–4485).[2] This admittedly proper instruction led to the court's further

[2] "R." refers to the transcript of proceedings at trial, a copy of which is on file with the Clerk of this Court.

charge that, as to the conspiracy count, the verdict should be guilty or not guilty, "except that if you conclude that the defendant was guilty only of conspiracy to commit the misdemeanor of one or more of * * * the Food and Drug counts, your verdict would take the form, guilty as a misdemeanor" (R. 4506). This instruction was necessitated by the second paragraph of 18 U.S.C. 371, which provides:

> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Both courts below held that the apparent inconsistency in the jury's verdicts, which was occasioned by the nature of the charges in this case, did not indicate that petitioner had been denied a fair trial. There is no cause for further review. As the court of appeals observed, the jury could have thought that with respect to the conspiracy, it had to consider the intent, not only of petitioner, but also of the other defendants, while on the substantive counts only petitioner's intent was in issue. There is no reason to believe that the jury did not properly perform its function in determining petitioner's personal intent as to the mail fraud and misbranding counts.

In all events, the verdict does not differ materially from cases where this Court ruled that inconsistent verdicts do not require reversal of convictions. *E.g., Dunn* v. *United States,* 284 U.S. 390; see *United States* v. *Dotterweich,* 320 U.S. 277, 279. As the court ex-

plained in *United States* v. *Carbone,* 378 F. 2d 420, 422–423 (C.A. 2), certiorari denied, 389 U.S. 914:

> The very fact that the jury may have acquitted of one or more counts in a multi-count indictment because of a belief that the counts on which it was [sic] convicted will provide sufficient punishment * * * forbids allowing the acquittal to upset or even to affect the simultaneous conviction. * * * Indeed, if the rule were otherwise, the Government would be entitled to have the jury warned that an acquittal on some counts might undermine a guilty verdict on others—almost the opposite of the standard instruction, which is obviously beneficial to criminal defendants, and which the judge gave here without objection. It is true * * * that allowing inconsistent verdicts in criminal trials runs the risk that an occasional conviction may have been the result of compromise. But the advantage of leaving the jury free to exercise its historic power of lenity has been correctly thought to outweigh that danger. * * *

2. Petitioner's general discussion of the Second Circuit's decisions on the admissibility of hearsay testimony in a conspiracy case has no bearing on the disposition of this case. Although petitioner was tried alone, his concerted action with others in organizing the company and making changes in the book, and the actions of other participants in the scheme, would have had to be proved, even in the absence of a conspiracy count. The addition of the conspiracy count did not subject petitioner to double jeopardy. *Pereira* v. *United States,* 347 U.S. 1, 11; see *Gore* v. *United*

States, 357 U.S. 386; *Callanan* v. *United States,* 364 U.S. 587. And since petitioner's suspended sentence on the conspiracy count was concurrent with the suspended sentences on four of the substantive counts, which petitioner does not challenge, the validity of the conspiracy conviction need not be reached. *Hirabayashi* v. *United States,* 320 U.S. 81, 85; *Lawn* v. *United States,* 355 U.S. 339, 359; *United States* v. *Gainey,* 380 U.S. 63, 65.

3. Petitioner contends that it was prejudicial error to admit the government's evidence discrediting the scientific validity of his dietary theory of use of polyunsaturated fats to cure obesity. The argument is based primarily on the fact that, at a pre-trial conference on February 21, 1967, the Assistant United States Attorney, to whom the case had just been assigned, stated that the indictment did not encompass the question of the scientific validity of petitioner's weight-reducing theory, but only whether the representations regarding the safflower oil capsules were fraudulent in terms of petitioner's own theory (Feb. 21 Transcript, pp. 3, 29–30, 32–34, 45).[3] The trial judge and petitioner's counsel expressed a contrary view, and defense counsel at one point indicated a willingness to meet the broader issue should the government decide to raise it (*id.* at pp. 24, 29–34, 45). The discussion ended with no understanding having been reached (*id.* at pp. 45–46).

In his opening statement at trial (on April 4, 1967),

[3] A copy of this transcript is on file with the Clerk of this Court.

the prosecutor stated that the government would prove, *inter alia,* that petitioner's basic dietary theory was invalid (R. 8–9, 28). The first such proof was not offered until seventeen days later, through one of three expert witnesses who testified on the question. At no time did petitioner request a continuance to enable him to prepare his defense on this issue. The defense called more than twenty former patients of petitioner (some of whom were doctors), who expressed satisfaction with his weight reduction treatments, and petitioner himself testified in support of his basic theory.

The courts below correctly held that the admission of the government's expert testimony was not error. As the court of appeals found (Pet. App. A, p. 5), the indictment, fairly read, "does put the validity of [petitioner's] theory in issue." The government was not estopped from introducing evidence challenging petitioner's underlying dietary theory by the discussion at the pre-trial conference reflecting a disagreement as to the interpretation of the indictment. And the record shows that petitioner was not unfairly surprised or unable adequately to prepare his defense.

Petitioner also argues (Pet. 30–31) that the expert medical testimony was inadmissible or was admissible only with cautionary instructions since it was not based upon a "universality of scientific belief" (*Reilly* v. *Pinkus,* 338 U.S. 269, 276). In *Reilly,* where the evidence was offered to prove fraudulent intent, the Court held that it was error to limit the cross-examination of the government's expert witnesses because the ab-

sence of a "universality of scientific belief" was relevant to whether an inference of such intent could properly be drawn from the evidence. In the present case, as the court of appeals noted (Pet. App. A, p. 6), the "testimony was introduced only to establish that the advertising claims made for [petitioner's diet] were scientifically false and was admissible for this purpose." *United States* v. *Andreadis,* 366 F. 2d 423, 433 (C.A. 2), certiorari denied, 385 U.S. 1001.

4. With respect to accomplice testimony, the court gave the following instruction (R. 4497–4498):

> An accomplice does not become incompetent as a witness because of his participation in the criminal acts charged. On the contrary, if the only evidence on some or all of the essential elements of any count is the testimony of an accomplice, it may still be of sufficient weight, if you believe it, to sustain a verdict of guilty without corroboration in or support of other evidence.
>
> Yet, bear in mind that accomplice testimony is to be received with caution and weighed with care. You should not convict on unsupported accomplice testimony unless you believe that testimony beyond a reasonable doubt.

Petitioner contends that the foregoing instruction constituted "plain error," under *Holmgren* v. *United States,* 217 U.S. 509, because accomplices furnished all of the arguably inculpatory evidence against him on the issue of guilty scienter (Pet. 31–37). This contention rests primarily on petitioner's unfounded assertion that several of the government's more damaging witnesses, such as the representatives of the

publisher, should be classified as "accomplices" in addition to his co-defendants (Pet. 32). In all events, *Holmgren* held only that it was the "better practice," although not required, for courts to instruct that the testimony of accomplices should not be credited in the absence of corroborating evidence. Petitioner made no request for such an instruction. His attempt to magnify what was at most a failure to adhere to "better practice" into plain error warranting reversal is without merit. *Holmgren* v. *United States, supra; Caminetti* v. *United States,* 242 U.S. 470, 495.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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